United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 636

UNITED STATES OF AMERICA,
Petitioner,
vs.
FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The *amicus curiae* appears (by appointment of the trial court) as counsel for the defendant in *United States v. Minski*, No. 637, now pending in this Court on Petition for Certiorari filed by the United States. The constitutional questions involved in the *Delia* and the *Minski* cases are to

a considerable extent identical, and the two cases were disposed of in one opinion by the Circuit Court of Appeals (131 Fed. 2d 614). The *amicus curiae* files this brief through the courtesy of counsel in the case, because of the importance of the questions involved.

QUESTIONS PRESENTED

1. Whether Section 2 (f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

2. Whether said Section 2 (f) is unconstitutional under Article I, Section 9 (3) forbidding *ex post facto* laws.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment in pertinent part provides:

> "No person shall be * * * subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law * * *."

Article I, Section 9 (3) provides:

> "No * * * ex post facto law shall be passed."

SUMMARY OF ARGUMENT

I. The presumption clause of Section 2 (f) of the Federal Firearms Act is unconstitutional because it denies due process of law. There is no rational connection between the proved fact (possession of the firearm) and the presumed fact (acquisition in interstate commerce). *Mobile R. R. Co. v. Turnipseed*, 219 U. S. 35. The mere possession of a firearm or ammunition by a person who has been convicted of a crime of violence establishes no

logical probability that he has received the firearm in interstate commerce. Congress had no adequate ground for assuming such probability; but in view of its anxiety to minimize interstate traffic in firearms on the part of ex-convicts, chose to establish such probability by legislative fiat. The presumption has no basis in ordinary experience, and the proved fact does not point logically to the presumed fact.

II. There is even less rational connection between the ex-convict's possession of a firearm and the presumption that he acquired it subsequent to the effective date of the Act.

III. If these presumptions are unreasonable, it is no answer to say that the conveniences of proof require the defendant to explain his possession of the firearm. The decisions of this Court clearly set forth two requirements with reference to such legislation:

(1) That there be a logical and rational connection between the proved fact and the presumed fact: *and*

(2) That the presumption be rebuttable, and not conclusive.

Both of these requirements must be met if the legislation is to be upheld. An unreasonable presumption will not be sustained merely because it is rebuttable.

IV. Petitioner concedes to some extent the irrationality of the presumption, but urges the following points:

A. Congress had power to prohibit even the possession of firearms by ex-convicts, on the ground that such persons are likely to move from one state to another; citing *United States v. Darby*, 312 U. S. 100, 118. Therefore, inasmuch as Congress had this

larger power, it also had the right to exercise the less extensive power asserted in the present presumption clause. *Ferry v. Ramsey*, 277 U. S. 88. These two decisions do not support Petitioner's position. In the first place, there is no *probability* that ex-convicts possessing firearms will move from one state to another. In the second place, the regulation of mere possession of firearms, whether by ex-convicts or by other persons, is exclusively within the police power of the respective states. Even accepting the interpretation of *Ferry v. Ramsay*, adopted by Petitioner, there is in the present case no factual background that warrants application of such interpretation.

B. The defendant was required to prove he had acquired his gun in an intrastate transaction before he could complain of any invalidity in the Statute. *Williams v. Walsh*, 222 U. S. 415. Here again, Petitioner bases his argument on the untenable assumption that Congress would have the right to penalize mere possession of a firearm by an ex-convict. Even so, the defendant as an ex-convict is within the class of persons with respect to which the Act is unconstitutional.

V. Section 2 (f) is also unconstitutional for the following reasons:

A. The section is so vague and indefinite that it is impossible to determine just what acts are prohibited. More specifically, it is impossible to decide whether the firearm must have been received by the defendant in the course of interstate commerce, or whether he need only have received a firearm which at some previous time had been transported by another person in interstate commerce.

B. The section violates Article I, Section 9 (3) of the Constitution because it is *ex post facto* legislation, and it also violates the Fifth Amendment in that it subjects defendant "for the same offence to be twice put in jeopardy of life or limb." The defendant, who has already been punished once for his former crime, is now punished a second time by the imposition of a material disadvantage in the form of the presumption.

C. The section further violates the due process clause because it denies a fair trial to the ex-convict. He is ordinarily compelled to do one of two things: either to stay off the witness stand, in which case the presumption will result in his conviction; or to choose the greater evil and take the stand. If he does this, his criminal record, which has already been placed before the jury as part of the Government's direct case, will be emphasized on cross examination. His credibility, for all practical purposes, is destroyed in the eyes of the jury; and unless he is so fortunate as to be able to produce strong outside testimony, he is certain to be convicted. The section, in effect, makes a mockery of the constitutional privilege of all defendants, that they be presumed innocent, until proved guilty. The section is an invaluable weapon to enforcement officers, and in operation practically insures conviction. But however effective the procedure may be, and however commendable the motives of Congress in seeking to stop interstate traffic in firearms, the sacrifice of the fundamental right to a fair trial cannot be justified.

ARGUMENT

I.

THE PRESUMPTION OF SECTION 2 (f) DENIES DUE PROCESS OF LAW

The principal question involved is a relatively simple and narrow one: namely, whether the presumption of interstate commerce is rational and reasonable, or whether, on the contrary, it is illogical and arbitrary. If the former, the presumption is constitutional; if the latter, it is unconstitutional.

A. The Law

The governing principle is set forth in *Mobile Railroad Company v. Turnipseed*, 219 U. S. 35, 43:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a *purely arbitrary mandate. So, also*, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed." (Italics ours.)

The following are the other principal cases, following this rule:

1. Cases holding the connection arbitrary and unreasonable.

McFarland v. American Sugar Refining Company, 241 U. S. 79: in which a presumption of a monopoly or com-

bination in restraint of trade, arising out of payment of a lower price in Louisiana than elsewhere, was held arbitrary. The Court said (p. 86):

> "The presumption created here has *no relation in experience to general facts*. It has no foundation except with tacit reference to the plaintiff. But is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." (Italics ours.)

Manley v. Georgia, 279 U. S. 1: in which a presumption of guilt on the part of bank directors, arising from mere inability of the bank to pay its debts, was held arbitrary and unreasonable. The Court said (p. 6):

> "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

Western Railroad v. Henderson, 279 U. S. 639: in which a presumption of negligence from the mere fact of collision was held arbitrary and invalid.

Morrison v. California, 291 U. S. 82: in which a presumption of guilt from mere occupation of land was held arbitrary and invalid.

2. Cases holding the connection logical and reasonable.

Luria v. United States, 231 U. S. 9: in which a presumption of lack of intention to become a citizen, arising out of taking up permanent residence in a foreign country, was upheld.

Hawes v. Georgia, 258 U. S. 1: in which a presumption of guilty knowledge, arising from the presence of a whisky still on the premises, was upheld on the theory that it might reasonably be presumed that the occupant

of a farm would know what was on it. In other words, there was a natural relation between the proved fact (that is, occupancy of the land) and the presumed fact (that is, knowledge of a still on the land).

Yee Hem v. United States, 268 U. S. 168: The statute provided that after July 1, 1913, all smoking opium found within the United States should be presumed to have been imported after April 1, 1909, "and the burden of proof shall be on the claimant or the accused to rebut such presumption." The Court said (p. 184):

> "We think it is not an illogical inference that opium, found in this country more than four years (in the present case, more than fourteen years) after its importation had been prohibited, was unlawfully imported. Nor do we think the further provision, that possession of such opium, in the absence of a satisfactory explanation, shall create a presumption of guilt, is 'so unreasonable as to be a purely arbitrary mandate.'"

Casey v. United States, 276 U. S. 413; in which a presumption of guilt, arising out of possession of a package of opium to which the required stamps were not affixed, was upheld as logical and reasonable. This Court divided on the point.

See also notes in *51 A. L. R.*, 1139 and *86 A. L. R.* 179.

• • • • •

As was pointed out by Mr. Justice Cardozo in *Morrison v. California, supra*, the foregoing principle of reasonableness of connection cannot be "crowded into a formula"; and the decision must apparently rest upon the nature of the presumption created by each particular statute.

In many of the cases above cited, the connection between the proved fact and the presumed fact was an ob-

vious one, as in *Hawes v. Georgia, supra.* In the opium cases, the unlawfulness of the drug was generally known, as well as the fact that all opium must presumably have been imported into this country; and therefore a fair presumption of guilt might attach to possession of the drug. In the *Luria* case the taking-up of permanent residence in a foreign country might logically raise a presumption of a lack of intention to become a United States citizen.

On the contrary, where the connection was illogical, this Court has not hesitated to declare the legislation unconstitutional. For example, in the *Manley* case the Court construed a Georgia statute, which made the proved fact of a bank's insolvency *prima facie* proof of the guilt of its directors, as being contrary to the due process clause of the Federal Constitution.

B. The presumption clause of Section 2 (f) is unreasonable and arbitrary.

The process of reasoning adopted by the section is somewhat as follows:

(a) The defendant was once convicted of a crime of violence;

(b) He was in possession of a firearm;

(c) *Therefore,* such firearm was presumably received by him in interstate commerce.

We respectfully contend that this presumption is an obvious *non sequitur*, and that no rational connection exists between the proved facts and the presumed fact.

Under Section 2(b), the law-abiding citizen is not presumed to have received the firearm in interstate commerce; but under Section 2(f), an ex-convict is so presumed. Admittedly, the ex-convict's possession of a weapon might

reasonably raise certain inferences—for example, that he intended to use it unlawfully; but such possession raises no presumption at all as to the source from which he obtained it.

To our way of thinking, an ex-convict is just as likely to secure a revolver within the State of Michigan as he is to have it shipped to him from outside the state. More likely, we should suppose: a local purchase would ordinarily be quicker and more convenient. In any case, if he wants a gun, he will try to secure it from whichever source happens to be more available at the moment.

C. Congress had no adequate grounds for believing the presumption was logical and reasonable.

Counsel for Petitioner stresses the following points (Brief, pages 18-26):

1. The revolver in this case was made in Massachusetts, and must therefore at some time have reached Michigan in interstate commerce. But this circumstances affords no support to the claim that defendant himself imported the gun in interstate commerce. Furthermore, as the court below said, the same presumption obtains in the New England States, in spite of the fact that most of the firearms industry is located in that section of the country. Thus, if the defendant had been arrested in Massachusetts, possessing a firearm made in Massachusetts, the presumption would nevertheless apply. The Act cannot be valid in Michigan, and invalid in Massachusetts.

2. Petitioner calls attention to the Michigan Statutes, regulating the possession of firearms, and asserts that inasmuch as defendant would be violating Michigan law if he acquired the gun within the State, an inference follows that he probably acquired it from outside the State. But there is little distinction between Michigan

laws and federal laws on this point. Let us assume that defendant would have violated Michigan law by acquiring his gun intrastate, and also that any intrastate transferor would have violated Michigan law by transferring the gun to defendant. But similarly, the Federal Firearms Act (Section 2(d)) makes it unlawful for any person to transport firearms to any other person, knowing or having reasonable cause to believe "that such other person has been convicted of a crime of violence"; and of course it is also unlawful under Section 2(f) for any person who has been convicted of a crime of violence to receive any such firearm which has been shipped in interstate commerce. Thus, the transaction is equally unlawful under Michigan and Federal Statutes, both as to the transferor and the transferee; and it cannot persuasively be urged that the ex-convict would prefer to violate Federal law. Therefore, no presumption arises out of the existence of Michigan statutes. And obviously, the chances are that ex-convicts, who wish to obtain guns, will secure them wherever they can find them, without particular thought as to which statute is involved. If they can acquire them within the State, they will do so; if, on the contrary, they have an opportunity to acquire them from outside the State, they will probably follow that method. As the Circuit Court of Appeals said, "one guess is as good as another"; and accordingly no presumption arises, one way or another.

As to ammunition, Petitioner points out that there are no Michigan statutes regulating its sale or possession; and therefore, no presumption could possibly arise in this respect.

3. But Petitioner further urges that Congress had other adequate grounds for believing it likely that acquisition of firearms by ex-convicts ordinarily involves inter-

state commerce (Brief, page 23-26). An examination of the statistics supplied by Petitioner leads to exactly the contrary conclusion, however. The fact that a small percentage of guns was imported into New York and Michigan in interstate commerce does not warrant the presumption that the firearm was probably so imported in the present case. The data before Congress, in so far as it is set forth in Petitioner's Brief, indicates merely the *possibility* of interstate acquisition, rather than the *probability;* and it is only the *probability* of acquisition that would justify Congress in enacting the presumption clause of Section 2(f).

And may it not be further said that the validity of such presumptions does not depend upon what Congress may have thought, or upon the motives of Congress? On the contrary, the presumption should stand or fall by the test of whether or not it is based on common experience and understanding. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86.

II.

THE PRESUMPTION OF SECTION 2 (f) LIKEWISE DENIES DUE PROCESS, IN THAT IT PRESUMES RECEIPT SUBSEQUENT TO THE EFFECTIVE DATE OF THE ACT

The Federal Firearms Act was passed on June 30, 1938, and became effective July 30, 1938. Defendant herein was accused of receiving and possessing his gun in 1941, approximately three years later. The gun was at least twenty years old at that time. The Government introduced no proof whatsoever that the defendant had acquired the firearm after the effective date of the Act, but relied upon the presumption that he had acquired same unlawfully—that is, after such effective date.

It is readily apparent that there is even less logical connection between his possession of the gun and the presumption that he acquired same after July 30, 1938, than there is between his possession and the presumption that he acquired the gun in interstate commerce. On this point, the presumption is manifestly based, not on any semblance of actual experience, but merely on legislative fiat.

Petitioner does not seriously dispute this (Brief, pp. 38-39).

III.

THE INVALIDITY OF THE PRESUMPTION CLAUSE IS NOT CURED BY THE FACT THAT IT IS REBUTTABLE

In *Mobile Railroad Co. v. Turnipseed*, 219 U. S. 35, 43, the Court, after stating that there must be some rational connection between the fact proved and the fact presumed, said:

> "*So, also*, it must not, under guise of regulating the presentation of evidence operate to preclude the party from the right to present his defense to the main fact thus presumed." (Italics ours.)

This language is quoted, or the same principle stated, in the following cases:

Manley v. Georgia, 279 U. S. 1;
Western R. R. Co. v. Henderson, 279 U. S. 639;
Morrison v. California, 291 U. S. 82;
Hawes v. Georgia, 258 U. S. 1;
Yee Hem v. U. S., 268 U. S. 168.

From the foregoing, it appears clear: first, that there must be a rational connection between the proved fact and the presumed fact; *and* second, that the presumption must

be rebuttable. Thus, even if the presumption is a reasonable one, it may not be made conclusive. Similarly, if the presumption is an unreasonable one, the fact that it is rebuttable will not save it from unconstitutionality. It follows that if the presumption clause of Section 2(f) is unreasonable, as we have argued, then its rebuttability is immaterial.

This much seems beyond dispute. For if the correct rule were otherwise, it would follow that no matter how unfair and even ridiculous the presumption, it would have to be sustained, provided the accused was given an opportunity to rebut it. This, clearly, cannot be the law.

As we shall argue later, the opportunity thus given to the ex-convict to rebut the presumption is not of much value to him. His criminal record is already before the jury, and will be further paraded on cross-examination: with the inevitable result that no story he may tell will be believed by the jury.

In *Morrison v. California, supra*, there is an interesting discussion of a somewhat similar situation, and Mr. Justice Cardozo states (page 96):

> "There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People."

See also *Powers v. Indiana*, 204 Ind. 472 (1933), 184 N. E. 349; 86 A. L. R. 166: in which a presumption of intent to commit a felony, arising out of a failure to have a permit to carry a firearm, was held arbitary and invalid. The court said:

> "We cannot agree with the proposition that, if the Legislature gives a party a fair opportunity to establish his defense, and give evidence, the enact-

> ment is constitutional. Such a rule would require a defendant to prove himself innocent, notwithstanding the evidence against him, unsupported by legislative enactment, would not be sufficient to sustain a verdict of guilty."

Or, as was said by the lower court in the present case:

> "It follows, further, that if at the close of the Government's proof the accused seeks to defend himself, the burden is cast upon him of explaining a situation which up to that point had no incriminating tendency or effect."

IV.

THE PRESUMPTION CLAUSE CANNOT BE SAVED BY THE THEORY THAT CONGRESS MIGHT HAVE FORBIDDEN MERE POSSESSION OF FIREARMS BY EX-CONVICTS

A. Petitioner, citing *U. S. v. Darby,* 312 U. S. 100, 118, and *Ferry v. Ramsey,* 277 U. S. 88, builds up an elaborate theory that the presumption is valid, even though unreasonable.

Petitioner's theory, as we understand it, is somewhat as follows. Under the authority of the *Darby* case, Congress might have prohibited even the *possession* of firearms by ex-convicts, on the ground that such persons are likely to move from one state to another. Therefore, Congress also had the lesser power to forbid the interstate traffic in firearms and to couple the present presumption with such prohibition.

The *Darby* decision does not appear to support Petitioner's argument. This was a case involving the constitutionality of the Fair Labor Standards Act, of which Section 15(a) (2) requires employers to conform to the

wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. This Court held that the power of Congress extends to those intrastate activities which so affect interstate commerce as to make regulation of them appropriate means to the legitimate end; and further, that Congress may regulate intrastate activities when they have a substantial effect on interstate commerce.

Thus, Petitioner would have to make it clear that the possession of firearms by ex-convicts has a direct and substantial effect on interstate commerce. In other words, Petitioner would have to show that *most* ex-convicts habitually travel from one state to another. Petitioner's Counsel has not been able to do this. A perusal of the scanty statistics set forth in his Brief, page 36, indicates quite the contrary—namely, that only a small percentage of such ex-convicts habitually move from one state to another.

Indeed, in several places in his Brief, counsel calls attention to Congress' own doubts as to its power to pass any such legislation (See pages 14, 44).

It seems clear, even without citations, that the mere possession of firearms by ex-convicts is peculiarly a matter for state legislation and enforcement. The State of Michigan has legislated fully on this subject. One may go further and state that the present prosecution should properly have been in the Michigan courts, and that there was no reason to invoke federal jurisdiction.

See *Schechter Corp. v. United States*, 295 U. S. 495, 544. On page 546, Mr. Justice Hughes comments as follows:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all

> the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

The *Ferry* case involved a Georgia statute, which among other things made it unlawful for bank directors to assent to deposits in the bank after having knowledge of its insolvency; and which further provided that the fact of insolvency was *prima facie* evidence of knowledge and assent. By a divided opinion, this Court pointed out that the statute might have gone further than it did, and might have made directors liable in every case of insolvency. Mr. Justice Holmes' opinion seems to be based primarily upon the following language:

> "The essential thing is that • • • the statute has said if you take the office, you must take the consequences of knowledge whether you have it or not" (page 95).

The case was decided in 1928; and it is a curious circumstance that it does not appear to have been once cited by this Court during the intervening fifteen years.

But even if the *Ferry* case be interpreted as petitioner suggests, it is difficult to see how it controls the present situation. In the first place, as we have already pointed out, it is extremely doubtful, to say the least, that Congress would have power to exercise the larger power of penalizing mere possession of firearms; and if this is so, then the *Ferry* doctrine could not apply. In the second place the decision dealt only with a state statute, and the matter of interstate commerce was in no way involved.

It seems to us that the present case should be decided on the narrow issue of whether or not the presumption of Section 2 (f) is reasonable or unreasonable. It is not necessary to go far afield from this simple question, or

to attempt to solve the problem by a contemplation of what Congress might have done—probably without constitutional right.

B. Petitioner also makes the point (Brief, pages 44-48) that the defendant was required to prove he had acquired his gun in intrastate commerce before he could question the Act.

Here again, Petitioner's argument is based upon the assumption that Congress had power to prohibit mere possession of firearms by ex-convicts. If this assumption is incorrect, as we have attempted to show, then Petitioner's argument along these lines must fall.

But even accepting Petitioner's theory, it does not follow that this defendant cannot raise the question of constitutionality.

Section 2 (f) applies to a particular class of persons—namely, those who have been convicted of crimes of violence; and fugitives from justice. The presumption of interstate commerce applies only to such persons. With respect to all other classes, no such presumption arises; and it is necessary for the Government to prove that they received firearms in interstate commerce *with knowledge*.

Therefore, it would appear that all that need be shown by this defendant, in order to raise the question of the constitutionality of Section 2(f), is a prior conviction of a crime of violence. In other words, that he belongs to the class against which the presumption operates. But all this was proved by the Government itself.

The effect of Petitioner's theory would be to shift the burden to defendant in precisely the same way as does the present unreasonable presumption.

V.

THE SECTION IS UNCONSTITUTIONAL FOR THREE ADDITIONAL REASONS

A. It is so vague and indefinite as to constitute a denial of due process of law.

In *Connally v. General Construction Company*, 269 U. S. 385; 70 L. Ed. 322, this Court said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In *Yu Cong Eng v. Trinidad*, 271 U. S. 500, this Court said (page 522):

> "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute *reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact*, and thus save the statute from invalidity." (Italics ours.)

See also *Lanzetta v. New Jersey*, 306 U. S. 451.

Section 2 (f), defining the particular offense, provides that it shall be unlawful for any ex-convict to receive any firearm or ammunition "which has been shipped or transported in interstate or foreign commerce."

The subsection does not say "which has been shipped or transported *to him* in interstate or foreign commerce"; nor does it say it shall be unlawful for him to *receive* such firearm *in interstate or foreign commerce*. On the contrary, it is made unlawful merely to receive a firearm or ammunition "*which has been shipped* * * * in interstate or foreign commerce."

There would seem to be a fair inference that the offense includes the receipt by ex-convicts of firearms or ammunition which have been shipped or transported into the state *by other persons and to other persons at some previous time*.

B. The section is ex post facto legislation, and also places defendant in double jeopardy.

The defendant was additionally penalized in the present proceeding by virtue of the fact that some ten years earlier he had been convicted of a crime of violence. This additional penalty is in the imposition of a presumption of guilt. The ex-convict is not given the benefit of the same rule of evidence as the law-abiding citizen, who under Subsection (b) must be shown to have had *reasonable cause to believe* the firearm or ammunition had been transported in interstate commerce.

It may be argued that this contention has been decided adversely to us in several cases, on the theory that the additional disadvantage to the ex-convict is not in the nature of a punishment for his past crime, but only for the new crime. Habitual criminal acts in several states have been upheld on this ground.

McDonald v. Commissioner, 180 U. S. 311.

See also *16 C. J. S.* 901.

But we do not believe this reasoning is applicable to the Federal Firearms Act. Under habitual criminal acts, the

old conviction becomes pertinent *only in fixing the sentence* for the new conviction. Under these acts, the defendant is penalized *after his conviction for the new crime;* whereas under Section 2 (f) he is penalized *before* he is re-convicted, and therefore it cannot be said in any sense that he is being punished for a new crime, of which he has not yet been convicted.

In the instant case, the defendant was convicted of a crime of violence in 1930 and sentenced to prison. Presumably, he paid the penalty for his crime. Now he is brought to the bar a second time, and because of his former conviction, the presumption of interstate shipment arises against him. This is a serious disadvantage, and clearly constitutes an additional penalty for his former crime, for which he has already been punished once. Moreover, he is once more placed in jeopardy for his first offense.

The additional penalty, forbidden by the Constitution, may consist of any material disadvantage to the defendant. In *Lindsay v. Washington,* 301 U. S. 397, Mr. Justice Stone said (p. 401):

> "The Constitution forbids the application of *any new punitive measure* to a crime already committed, *to the detriment or material disadvantage* of the wrongdoer." (Italics ours.)

C. Section 2 (f) further violates the due process clause of the Fifth Amendment because it essentially denies a fair trial to the ex-convict.

One must view the present case from the assumption that the defendant is innocent until proved guilty. He has that right, regardless of his criminal record.

Another of his rights is the right to stay off the witness stand without prejudice. As every lawyer knows, it is

usually fatal for an ex-convict to take the stand in his own defense. Rightly or wrongly, the jury disbelieves him; and in many cases he is convicted, not for the present offense, but because he has a criminal record.

This is a different, and far more serious situation than that presented in civil cases, or even in criminal cases in which the prior criminal record of the defendant is not materially involved. Section 2 (f) finds its whole basis in the prior conviction of the defendant.

Let us consider the chances of the defendant for a fair trial. In the first place, the Government introduces testimony showing that he is an ex-convict. In the second place, once the Government has shown facts tending to show his possession of the gun, the presumption arises; and he must then take his choice of two evils. First, he can decide not to take the stand, and in that event he will be convicted because of the presumption. Second, he may decide to take the stand; and if he does so, the prosecution will naturally cross examine him fully with reference to his past criminal record. The almost inevitable result in either case is the conviction of the defendant.

His only hope is to produce irreproachable documentary evidence showing his acquisition of the gun in an intrastate transaction. Petioner (Brief, page 27) rather lightly asserts that the defendant may subpoena the seller of the weapon and his records; and further (Brief, page 29) that the defendant need only create a reasonable doubt in the jury's mind. Practically, this does not mean much. Ex-convicts do not, as Petitioner's Counsel himself suggests, transact business in quite the same meticulous way as business men. Thus, it would be an extremely rare thing for the defendant to be able to subpoena any records. The

same applies to his friends and associates; even if he can obtain their testimony, as in the *Tot* case (Docket No. 569), his witnesses are not likely to be believed.

If the Government says that this is the defendant's own fault, and that an ex-convict has no right to possess a gun, we must agree. But here we are dealing, not with defendant's moral obliquity, but solely with the propriety of federal jurisdiction. This offense is primarily a state matter; the Michigan Statutes amply cover the situation;* and prosecution should be under Michigan laws.

Congress' purpose in enacting the Federal Firearms Act was, of course, most commendable. There can be no question that state borderlines have handicapped local officials in coping with lawlessness. And there can be no question of Congress' rights to regulate interstate traffic in firearms. But the only question here involved is whether or not the presumption clause of Section 2 (f) is constitutional.

A public emergency, however real, cannot empower Congress to adopt arbitrary and artificial presumptions. As was said by Sir William Scott, *The LeLouis*, 2 Dodson, Adm. 210, 257, 165 Eng. Reprint, 1464, 1479 (quoted by Mr. Justice McReynolds, in *Carroll v. United States*, 267 U. S. 132, on page 163):

> "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice."

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*See Michigan Statute in Appendix.

Whatever may have been the purpose of Congress, the practical effect of Section 2 (f) is to throw the judicial weight heavily against the ex-convict—almost, in effect, to insure his conviction. The section may thus be an invaluable weapon to prosecuting officers, but the price of its unconstitutionality is too high: what usually happens is that the ex-convict does not receive that kind of fair trial and that sort of fair play which is the very essence of our jurisprudence.

As Mr. Justice Roberts said in *Lisenba v. California*, 314 U. S. 219, 236:

> "Denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

Even the ex-convict is entitled to fair play. The plain and ultimate fact, however, is that he does not receive it under Section 2 (f) of the Federal Firearms Act.

CONCLUSION

Finally, attention should be called to the curious character of the Federal Firearms Act, and to its unusual combination of aims and purposes. The Act is codified under "Commerce and Trade." Also, it is obviously a tax measure. Under these two disguises, it is also a criminal statute.

Somewhat the same situation obtained in *Casey v. United States*, 276 U. S. 413, in which Mr. Justice Butler, in dissenting, said (page 428):

> "And it is always to be remembered that this act is to be construed as a measure to 'lay and collect taxes.' It has no other legal existence. * * * It is hard to continue to say that this act is a taxing

measure in order to sustain it. Eagerness to use federal law as a police measure to combat the opium habit—a purpose for which Congress has no power to legislate—should not lead to the enactment or the construction of laws that shock common sense."

It is submitted that the judgment of the Circuit Court of Appeals in this case should be affirmed.

Respectfully,

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APPENDIX

Michigan Statutes Annotated contain two analogous provisions:

> "28.424. Carrying concealed weapons without license. Sec. 227. Any person who shall carry a dagger, dirk, stiletto or other dangerous weapon except hunting knives adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him; and *any person who shall carry a pistol concealed on or about his person, or, whether concealed or otherwise, in any vehicle operated or occupied by him,* except in his dwelling house or place of business or on other land possessed by him, without a license to so carry said pistol as provided by law, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five (5) years, or by fine of not more than two thousand five hundred (2,500) dollars." (Italics ours.)

See also Michigan statutes referred to in Petitioner's Brief.